IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979
No. 79-478

THE ALMA SOCIETY, INC., ET AL.,

Petitioners

v.

IRVING MELLON ET AL.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ALLEN G. SCHWARTZ
Corporation Counsel of
The City of New York
Attorney for Respondent,
100 Church Street
New York, N.Y. 10007

L. KEVIN SHERIDAN,
CAROLYN E. DEMAREST,
PETER LAVIGNE,
of Counsel.

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Preliminary Statement

Respondent Irving Mellon, Director of Vital Records for the City of New York, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment of the Court of Appeals of the Second Circuit in this case.

The opinion of the Court of Appeals, reported at 601 F.2d 1225, has been reproduced and appended as Appendix A to the petition, pages 1a to 28a. The opinion of the District Court for the Southern District, reported at 459 F. Supp. 912 (1978), has been reproduced and appended as Appendix C to the petition, pages 32a to 43a. The New York State statutes requiring the sealing of adoption records (Domestic Relations Law §114, Public Health Law §4138, and Social Services Law §327) are reproduced as footnote 1 to the Court of Appeals opinion, petitioners' Appendix A, pages 4a to 7a, and New York City Administrative Code §567-2.0, concerning the sealing of adoption records, is reproduced as Appendix D to the petition, page 46a.

Statement of the Case

Petitioners are adults who were adopted as children, and who seek to obtain their sealed adoption records, including the names of their natural parents, without the necessity of a showing of cause as required by New York Domestic Relations Law §114.*

Respondents are municipal officials who have custody of the original birth certificate of the petitioners, surrogates of the counties in which twelve of the petitioners were adopted and in which the court records in their adoption proceedings are now kept under seal, and five private agencies that handled the adoptions of

*Reproduced in Petitioner's Appendix A at 4a-5a, footnote 1.

fourteen of the petitioners and that now keep their records of these adoptions under seal.

Petitioners allege that the present requirement that adoptees make a showing of cause and obtain a court order to gain access to their records can lead to psychological trauma, health risks arising from ignorance of the medical history of the adoptee's natural family, the danger of incest, and a crisis of religious identity.

POINT I

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE THIRTEENTH AMENDMENT ITSELF, UNAIDED BY LEGISLATION, DOES NOT REACH ALL THE "BADGES AND INCIDENTS" OF SLAVERY.

The Court of Appeals noted in its opinion (at 25a)* that this Court "has never held that the (Thirteenth) Amendment itself, unaided by legislation as it is here, reaches the 'badges and incidents' of slavery as well as the actual conditions of slavery and involuntary servitude," citing Palmer v. Thompson, 403 U.S. 217, 226-27 (1971); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439, 440 (1968); Plessy v. Ferguson, 163 U.S.

*Numbers followed by lower case "a", in parentheses, refer to pages of the appendices to the petition.

537, 542 (1896); The Civil Rights Cases, 109 U.S. 3, 20-21,23,24,25 (1883); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69, 72 (1873). In Palmer v. Thompson, supra, this Court rejected the argument that, since the denial of the right of Blacks to swim in integrated pools is said to be a "badge or incident" of slavery, the Court should declare that the City of Jackson's closing of the pools to keep the two races apart violates the Thirteenth Amendment, stating, "Establishing this Court's authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a lawmaking power far beyond the imagination of the amendment's authors" (403 U.S. at 226-227). The Court emphasized instead

the importance of the last sentence of the Amendment, which provides, "Congress shall have power to enforce this article by appropriate legislation" (403 U.S. at 227).

Petitioners cite no cases in support of their proposition that the Thirteenth Amendment itself reaches the "badges and incidents" of slavery, except Jones v. Alfred H. Mayer Co., supra, which, they admit, expressly did not decide the question, and Bailey v. Alabama, 219 U.S. 219, 241 (1911), which stated, "The plain intention was to abolish slavery of whatever name and form and all its badges and incidents..." But the Court there also noted, "While the Amendment was self-executing, so far as its terms were applicable to any

existing condition, Congress was authorized to secure its complete enforcement by appropriate legislation" (219 U.S. at 241). Indeed the decision in that case was grounded on a federal statute.

Recognizing that they have little support in the decisions of this Court, petitioners rely heavily on the legislative history of the Thirteenth Amendment. Their central thesis, sketchily presented in this petition, appears to be that the framers of the Thirteenth Amendment ("Framers") intended to abolish directly five incidents of slavery as well as the actual conditions of slavery and involuntary servitude, and that the second incident, severance of the parent-child relationship,

applies to that element of adoption laws which restricts access by adult adoptees to their adoption records.

Petitioners create the impression that there was some special significance, to the Framers, of the five incidents of slavery isolated by petitioners from the speech of Senator James Harlan of Iowa made on April 6, 1864 (Cong. Globe, 38th Cong., 1st Sess., 1439); however, a thorough reading of the speeches of Harlan and the other senators cited reveals that Harlan's "incidents of slavery" were only a rhetorical device.* He did not

*There does not appear to be any evidence, either, that the term "badges and incidents of slavery" used in Jones v. Alfred H. Mayer, Co., supra, and The Civil Rights Cases, supra, is derived from Harlan's "incidents of slavery."

offer a neat list of five incidents of slavery, as petitioners imply, but included other incidents, some denominated as such, some not, for example (Cong. Globe, supra, p. 1439):

> As if to put the cap on this climax of gigantic iniquity, they are denied the right to human sympathy...
>
> And then another incident of this institution is the suppression of the freedom of speech and of the press, not only among these down-trodden people themselves but among the white race*...
>
> It also precludes the practical possibility of maintaining schools for the education of those of the white race who have not the means to provide for their own mental culture....It also

*This paragraph and the one following cast some doubt on petitioners' explanation (petition at 26, 27) of why the Thirteenth Amendment would not, according to their interpretation, also incorporate freedom of speech and of the press, and the right to an equal education.

> impoverishes the State, as is manifest by a comparison of the relative wealth, population, and prosperity of the free and slave States of the Union.

Other Senators did not adopt Harlan's "incident of slavery" language, but used rhetorical devices of their own. Senator Clark of New Hampshire (Cong. Globe, 38th Cong., 1st Sess. 1369) speaking on March 31, 1864, personified slavery, saying, "She has practiced concubinage, destroyed the sanctity of marriage, and sundered and broken the domestic ties," but also that "she" excluded free schools from the slave states, devised the doctrine of States rights, claimed to nullify acts of Congress, and "stole into Texas,

caused it to rebel against Mexico, and then erected it into a slave State in the Union, and made the nation pay the debts of the adventure." Senator Wilson of Massachusetts, in a speech on March 28, 1864 (Cong. Globe, 38th Cong., 1st Sess., 1324), expressed a concern, among other things, for "the wronged victim of the slave system, the poor white man, the sand-hiller, the clay-eater of the wasted fields of Carolina, impoverished, debased, dishonored by the system..." And Representative Ashley of Ohio, in a speech on January 6, 1865 (Cong. Globe, 38th Cong. 2nd Sess., 138), argued that slavery

> has silenced every free pulpit within its control, and debauched thousands which ought to have been

> independent. It has denied the mass of poor white children within its power the privilege of free schools, and made free speech and a free press impossible within its domain, while ignorance, poverty, and vice are almost universal wherever it dominates.

It seems clear that the Framers were marshalling the evidence against the continued existence of slavery in the United States in order to assure the passage of the Thirteenth Amendment. It does not follow, and it is not directly stated anywhere, that the Framers intended to give this Court, by means of the Thirteenth Amendment itself, the authority to remedy each of the variously described incidents, results or evils of slavery. That authority, to the extent given, was given by section 2 of the Thirteenth Amendment to Congress.

This Court has already so held in Palmer v. Thompson, supra, 403 U.S. at 226-227, and it was therefore correct for the court of appeals to hold that the Thirteenth Amendment itself does not, unaided by legislation, reach the incidents of slavery as well as the actual conditions of slavery and involuntary servitude.

POINT II

PETITIONERS' CLAIM THAT THE NEW YORK SEALED RECORDS LAW IMPOSES AN INCIDENT OF SLAVERY ON ADULT ADOPTEES IS NOT OF SUCH SIGNIFICANCE AS TO REQUIRE SUPREME COURT REVIEW.

Petitioners attempt to create an emotional climate favorable to their argument by comparing adoption to the enforced separations of slavery, as when they cite representative Shannon's

denunciation of tne "tearing from the mother's arms the sucking child, and selling them to different and distant owners" (petition at 19). Yet petitioners are not attacking adoption by itself, but only that element of the adoption laws which prevents adult adoptees from obtaining unrestricted access to their adoption records.

Any reference to the pathos of the separation of parents and minor children is a non sequitur, for two reasons. First, petitioners do not question the right of states to pass laws permitting the adoption of minors. Second, adoption is a necessary and humanitarian process. The state, by means of adoption, provides a new home of loving and caring

parents for children whose own parents are unwilling or unable to care for them. While there are benefits for each of the parties, the focus of the adoption process is on the welfare of the child.

When seen in this light, any comparison of petitioners' condition to a condition of slavery is absurd. As adults they are not owned by any person; they are not forced to labor; their movements are not restricted. Their only restriction is on information concerning their families, and the coincidental similarity between this restriction and one of the incidents of slavery as practiced in this country in the last century does not justify the application of the Thirteenth Amendment to this case.

Moreover, and it is significant here that petitioners take little note of this, under the New York laws here challenged, adoptees can, for good cause, obtain access to their records. This is, then, not a scheme that resembles slavery, but rather a balanced, humanitarian approach to a most difficult social problem, where, of necessity, competing interests must be weighed and a balance struck.

The inability of adult adoptees to gain unrestricted access to their family histories may be hard for some, and it may be that the laws should be altered in some respects, but there are a great number of policy considerations to be weighed before any such change is made. Certainly, an

Amendment to the Constitution aimed directly at abolishing an evil, divisive and inhumane institution such as slavery should not be applied to the sealed records law, an important element of a humane and necessary institution.

CONCLUSION

The petition for a writ of certiorari should be denied.

November 19, 1979

Respectfully Submitted,

ALLEN G. SCHWARTZ,
Corporation Counsel for
The City of New York,
Attorney for Respondent
Irving Mellon

L. KEVIN SHERIDAN,
CAROLYN E. DEMAREST,
PETER LAVIGNE,
of Counsel.